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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1058

POTOMAC CHEMICAL COMPANY, INC.,
Petitioner,

vs.

WILLIAM O. CHAPMAN

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

ALVIN L. NEWMYER,
Counsel for Petitioner.

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To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Potomac Chemical Company, Inc., a corporation, respectfully shows to this Honorable Court, as follows:

Petitioner is engaged in business in the District of Columbia as a manufacturer of a rust preventative called "Tectyl". Respondent sued petitioner in the District Court of the United States for the District of Columbia to recover compensation in the form of commissions on sales of Tectyl

made by petitioner to certain of its customers who were alleged to have been brought to the petitioner by the respondent. The suit was based on a letter form of contract entered into by the parties on January 11, 1941 whereby respondent was to receive 10% on all orders of Tectyl which respondent procured for petitioner. The letter agreement contained no statement as to its duration. Petitioner terminated the employment by letter to the respondent dated August 1, 1941. The letter of termination informed the respondent that he was to solicit no more business for petitioner and that he would "be given credit for the accounts now listed under your name for a period of thirty (30) days" (R. 30). During the 6½ months period of employment the orders procured by respondent aggregated $200.69. The nominal volume of business brought in by respondent and his failure to devote sufficient time to petitioner's business prompted the action taken by petitioner in terminating the employment (R. 36). Respondent was only one of many salesmen employed by petitioner to sell its product (R. 37).

As a result of the sudden increased demand for a rust preventative brought about by the declaration of war four months after the contract was terminated, petitioner's volume of sales was markedly increased. Some of its sales, made after war was declared, were made to companies from whom respondent, during his brief employment, had obtained the orders aggregating $200.69 or whom he had contacted by sending samples. Such sales amounted to about $42,000. Respondent brought his action on the theory that he was entitled to a commission equal to 10% of such sales, irrespective of the termination of his employment before such sales were made, because he had, during his brief employment, contacted the companies who purchased Tectyl from petitioner after the sharp demands of war production following Pearl Harbor Day.

The theory of the case finally adopted by the respondent in the District Court was that he was the procuring cause of the sales upon which he claimed the commission. There had been some doubt during the pendency of the action whether the theory of the action was to recover damages for breach of contract. The case was tried in the District Court before the court and jury and was submitted to the jury, over petitioner's objection, on the theory that if the jury found that respondent was the procuring cause of the orders received by petitioner they should return a verdict in an amount equal to 10% of such orders. The theory of damages for breach of contract was abandoned. *The trial judge did not rule on the question of petitioner's good or bad faith in terminating the contract nor was that question submitted to the jury in any form.*

The jury returned its verdict in the sum of $4200 and, after a motion for new trial was overruled, judgment was entered for respondent in that amount (R. 8).

Petitioner appealed to the United States Court of Appeals for the District of Columbia and the judgment was affirmed on December 26, 1944, by an opinion written by Mr. Justice Edgerton (R. 52). A petition for rehearing (R. 56) was filed by petitioner and it was denied on January 18, 1945 (R. 66). On the appeal petitioner urged that the judgment of the District Court could not be permitted to stand because before there could be a finding that respondent was the procuring cause of sales made after the termination of the employment there had to be a determination as to petitioner's right to terminate the contract. There was no dispute between the parties that the substantive law in the District of Columbia was that in a contract of employment silent as to duration the employer possessed the legal right to terminate provided that the termination was not made in bad faith to avoid payment of compensation earned. The same principle of law is im-

plictly announced in the opinion below. Petitioner urged the court below that a reversal on the appeal was inevitable due to the absence of any ruling by the trial court or finding by the jury with respect to whether petitioner possessed bad faith in terminating the contract, and that, in the absence of such a ruling or finding, it was error to have submitted the question of procuring cause to the jury.

The opinion of the Court of Appeals ignored the absence of such ruling or finding and *proceeded to make its own finding that petitioner acted in bad faith in terminating the contract.* On its petition for rehearing, petitioner submitted that the Court of Appeals did not have the power to make an original finding of fact on a material issue in a case tried by a jury, and that such action by the court violated the Seventh Amendment. However, the petition was denied (R. 67).

Jurisdiction

The decision of the United States Court of Appeals for the District of Columbia was rendered on December 26, 1944 (R. 53). The Petition for Rehearing was denied on January 18, 1945 (R. 66) This Court has jurisdiction by virtue of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, Ch. 229, 43 Stat. 936, 28 U. S. C. A. Section 347 (a).

Question Presented

Whether a Circuit Court of Appeals or the United States Court of Appeals for the District of Columbia can make an original finding on a material issue of fact in an action tried by a jury in the District Court where the issue was neither submitted to the jury nor ruled upon as a matter of law by the trial court.

Reasons Relied On for Allowance of the Writ

Petitioner relies on the following reasons why a writ of certiorari should be granted to review the decision of the United States Court of Appeals for the District of Columbia:

1. The opinion of the United States Court of Appeals for the District of Columbia impairs petitioner's right to a trial by jury and thus violates the Seventh Amendment of the Constitution of the United States in that in affirming the judgment in the District Court the appellate court made an original finding of fact on a vital factual issue in the case which was neither ruled on by the trial judge nor submitted by him to the jury.

2. The opinion of the United States Court of Appeals for the District of Columbia fails to give proper effect to applicable decisons of this Court relating to the Seventh Amendment.

3. Although frequent announcements have been made by this Court with respect to powers of review by Circuit Courts of Appeal and the United States Court of Appeals for the District of Columbia, no decision has specifically ruled upon the basic proposition that appellate review in jury cases does not empower the appellate court to make its own finding of fact where no finding was made in the trial court by either the trial judge or the jury.

Prayer

Wherefore your petitioner prays the allowance of a writ of certiorari to the United States Court of Appeals for the District of Columbia in this case, similarly entitled in that court and there designated as No. 8587; that said cause

may be reviewed and determined by this Court; and that the judgment below may then be reversed.

POTOMAC CHEMICAL COMPANY, INC.,
Petitioner;

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